Supreme Court, U.S.
FILED
APR 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Petitioner

v.

METRIX WAREHOUSE, INC. and CARL SCHWARTZ,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petition poses two simple questions:

1. Whether the Court should modify the business justification defense to an unlawful tying arrangement to require only proof of a business purpose rather than a proof of an actual need for a tying arrangement.

2. Whether the Court should reverse its long standing precedent requiring a defendant found to have engaged in an unlawful tying arrangement to prove that no less restrictive alternative exists as an essential element of the business justification defense.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In November 1979, Metrix Warehouse, Inc. ("Metrix"), an independent warehouse distributor of Mercedes-Benz replacement parts, brought suit against Daimler-Benz Aktiengesellschaft ("DBAG") and Mercedes-Benz of North America, Inc. ("MBNA"). Metrix alleged, *inter alia*, that the Defendants had engaged in an unreasonable combination in restraint of trade in the distribution of Mercedes-Benz ("M-B") parts to M-B automobile dealers in violation of Section 1 of the Sherman Anti-trust Act, 15 U.S.C. § 1. DBAG is the parent company of MBNA. Metrix sought approximately $2.3 million in damages.

MBNA subsequently counterclaimed against both Metrix and Carl Schwartz, President of Metrix, under § 2(c)

of the Robinson-Patman Act, 15 U.S.C. § 13(c), alleging that Metrix and Schwartz had engaged in a program of compensating the purchasing agents of M-B dealers in consideration for those agents buying M-B parts from Metrix.[1] MBNA also sought approximately $2.3 million in damages.

1. *The Underlying Facts*

MBNA, Metrix and approximately eight other warehouse distributors specialized in the United States distribution of fast-moving M-B replacement parts to M-B dealers during the relevant time period of 1974-1981. The approximately 3,000 fast-moving parts accounted for at least 80% of M-B parts sales. Most fast-moving M-B parts were not manufactured by MBNA but by German original equipment manufacturers ("OEMs") unaffiliated with the parties. OEMs made M-B parts to DBAG specifications and sold them to DBAG, as well as directly and indirectly to MBNA, Metrix and other warehouse distributors in the United States. Some OEMs—including Bosch, Behr and VDO—set up their own distribution subsidiaries in the United States, to whom they shipped M-B parts. In turn, the distributors sold their parts, without differentiation, to MBNA, Metrix and other warehouse distributors. Twenty percent of MBNA's annual parts purchases were made from independent OEM subsidiaries with distribution centers in the United States.

Consequently, many of the parts sold by Metrix and other warehouses were identical to and/or met the specifications of equivalent parts distributed by MBNA. C.A. App. 870-73, 876-77, 1454-56. Parts sold by those independent subsidiaries with distribution centers in the

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[1] The salient facts of this program are summarized in *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, et al.*, 716 F.2d 245 (4th Cir. 1983), in which the Fourth Circuit ruled that Metrix' program was a prima facie violation of Section 2(c).

United States had never been subjected to DBAG or MBNA quality control procedures. C.A. App. 1454-55. Indeed, MBNA had no quality control procedures for fast-moving parts. *Id.* Neither DBAG nor MBNA had established any program or procedure for the approval of non-OEM parts. C.A. App. 3194.

The M-B dealer agreement, signed by an officer of MBNA and each dealer, had a duration of only two years and conditioned the right to sell new M-B passenger cars on the dealer's purchase of M-B replacement parts exclusively from MBNA. Relying upon the appreciable market power it enjoyed in M-B passenger cars (based on the desirability of the M-B franchise, as well as on the car's uniqueness due to its history, status, reputation and prestige), and deeply disturbed by the diminishing replacement parts sales of the warehouse distributors, and consequently, its diminishing replacement parts sales, MBNA, beginning at least as early as 1977 and continuing through late 1981, undertook to combat the warehouse distributors and eliminate competition in the distribution of parts to M-B dealers in the United States. During this period, MBNA's share of sales to such dealers steadily increased while the shares of Metrix and other warehouse distributors declined correspondingly. As a result, Metrix commenced this action.

2. *The District Court Proceeding*

On June 4, 1982, the District Court made the following findings, pursuant to Fed. R. Civ. P. 56(d), in favor of Metrix on its Sherman Act claim:

> (1) that the M-B automobile and its replacement parts are two separate products;
>
> (2) that the express language of paragraph 9C of the dealer agreement conditions the sale of Mercedes-Benz automobiles on the purchase of replacement parts from Mercedes-Benz; and

(3) that a not insubstantial amount of interstate commerce is affected.

C.A. App. 112.

Metrix' claim and MBNA's counterclaim were consolidated and tried before a jury beginning on March 18, 1985.[2] On April 15, 1985, the jury unanimously found on a special verdict form that: (1) MBNA had violated the Sherman Act; (2) Metrix had suffered injury as a result; (3) Metrix suffered damages in the amount of approximately $2.3 million on its claim against MBNA before trebling; (4) MBNA had suffered no antitrust injury as a proximate result of the Robinson-Patman Act violations by Metrix and Schwartz; and (5) as a result, MBNA suffered no damages on its counterclaim against Metrix and Schwartz.

Judgment for Metrix was entered on April 17, 1985. Ten days later, MBNA moved for judgment notwithstanding the verdict ("JNOV") and alternatively a new trial. In the order dated June 19, 1985, ("the June 19 Order") appealed to the Fourth Circuit, the District Court: (1) upheld the jury verdict as to the violation and to the fact of injury on the claim by Metrix against MBNA; (2) set aside the jury's damage award to Metrix and granted a new jury trial solely on that question; (3) granted MBNA's JNOV motion on the counterclaim (or in the alternative, a new trial, in a subsequent order), thereby reversing the jury's finding that MBNA had not been injured as a result of Metrix' and Schwartz's § 2(c) violations; and (4) granted MBNA a new trial to prove the amount of its damages on its counterclaim.

3. *The Fourth Circuit Decision*

The appeal to the Fourth Circuit was an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from an order of the United States District Court for the District of Mary-

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[2] Summary judgment was entered in favor of DBAG prior to trial. The jury verdict, therefore, was effective only against MBNA.

land (the Honorable Edward S. Northrop) dated January 7, 1986, certifying the June 19 Order. The June 19 Order was deemed to contain controlling questions of law certifiable for interlocutory appeal under 28 U.S.C. § 1292(b). This Court subsequently granted and consolidated both parties' petitions for interlocutory appeal.

The Fourth Circuit reversed in part and affirmed in part the decision of the court below. It affirmed both the district court's judgment upholding MBNA's Sherman Act liability and its judgment granting a new trial on Metrix' damages. The appellate court reversed the trial court's judgment on MBNA's counterclaim ruling that "Metrix evidence was easily sufficient to support the jury's finding that MBNA suffered no lost sales from the 'incentive program.'" App. at 28a. Contrary to Petitioner's characterization of Metrix' incentive programs, "Metrix evidence showed 'incentive' programs were standard among independent warehouse distributors." *Id.* at 26a.[3]

The Fourth Circuit dismissed MBNA's claim that *Pick Mfg. Co. v. General Motors Corp.*, 299 U.S. 3 (1936), *aff'g* 80 F.2d 641 (7th Cir. 1935), established an Automobile Exception to liability. App. at 11a. The appellate court determined that this Court's opinion in *Pick* "bears none of the marks of an intended broad-based exception to the Sherman Act." *Id.* at 11a-12a. To the contrary, the Fourth Circuit held that this Court's holding in *Pick* "suggest no more than it found no clear error in the lower court's factual finding, i.e., the plaintiff failed to prove that GM's tying arrangement substantially lessened

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[3] MBNA's Petition directly contradicts the record where it states that MBNA dealers' decision to purchase Metrix parts was influenced by Metrix' incentive program. Furthermore, contrary to MBNA's Petition, the Fourth Circuit decision holding that the incentive program was a *prima facie* violation of § 2(c) of the Robinson-Patman Act never refers to or finds that the payments constitute "commercial bribery" or "kickbacks" as alleged by MBNA. *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, et al.*, 716 F.2d 245 (4th Cir. 1983).

competition . . ." and "did not consider or address the 'reasonableness' of the tie-in as a matter of law." *Id.* at 11a. Moreover, the Fourth Circuit rejected *Pick* as binding precedent on the ground that "it predated the application of the *per se* rules of tying arrangements by more than ten years." *Id.* at 12a-13a. *Pick* was decided solely under the rule of reason not the *per se* rule of illegality reaffirmed in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

Turning to MBNA's contention that it was entitled to a directed verdict or judgment notwithstanding the verdict on liability, the appellate court rejected MBNA's claim that it proved every conceivable element of the business justification defense. The Fourth Circuit rejected MBNA's argument that the tying arrangement was necessary to preserve customer goodwill ruling that:

> [t]here was evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment could find that feasible means less restrictive than the tie-in were available to maintain quality control.

Petition at App. 14a. With regard to MBNA's argument that the tie was necessary to satisfy alleged consumers' expectations of receiving "genuine parts," the Fourth Circuit observed "the evidence suggests that MBNA's judgment of its dealers and consumers ran contrary to the Sherman Act's policy that competition rules the market of trade." *Id.* at 15a. The appellate court found that the alleged consumer expectations could be satisfied by simply informing customers of the origin of the part sold, thereby leaving it to the consumer to decide if the MBNA part was "expected." Finally, the Fourth Circuit rejected MBNA's claim that the tying arrangement was necessary to prevent fraudulent warranty claims on the ground that MBNA failed to establish that its parts "could not be distinguished from those of competitors and that it could not avoid reimbursing dealers for com-

petitors' defective parts." *Id.* at 16a. In other words, MBNA simply failed to prove the tie-in was necessary to police dealer misconduct. Contrary to the Petition, the Fourth Circuit never found that MBNA's alleged justifications for the tie-in reflected "procompetitive" concerns. The bald assertion is simply wishful thinking on MBNA's part.

SUMMARY OF ARGUMENT

Review by this Court is inappropriate here, as this case simply does not fit within the parameters of Rule 17 of the Rules of this Court. MBNA requests the Court to review a Fourth Circuit decision upholding, pursuant to the appropriate standard of review, the jury verdict finding that MBNA violated the Sherman Act and rejecting its business justification defense. No new or unique questions of law were at issue. To the contrary, the jury and the Fourth Circuit applied established precedent to a classic unlawful tying arrangement. The Fourth Circuit decision does not conflict with Supreme Court precedent or decisions from other circuits. Furthermore, no other "special" or "important" reason exists for granting certiorari in this case. MBNA simply seeks a different result by urging the Court to create new law to suit MBNA's purpose.

Moreover, judicial economy militates against the grant of certiorari, as this case was before the Fourth Circuit on interlocutory appeal. The only issues before the Fourth Circuit were:

> 1. Would it have been reasonable as a matter of law for Mercedes-Benz to have required its dealers to purchase replacement parts only from Mercedes-Benz when such parts are intended to be integrated into Mercedes-Benz automobiles and when such dealers are franchished to sell Mercedes-Benz products and repair Mercedes-Benz automobiles under the Mercedes-Benz mark and logo?

2. Under what circumstances, if ever, must an antitrust plaintiff adjust its damage computation to take into account possibly lawful competition?

3. Is it proper for the trial judge to substitute his own view of witness credibility for that of the jury's absent an award so excessive as to shock the judicial conscience?

4. Does a finding of a violation of Section 2(c) of the Robinson-Patman Act give rise to a presumption of fact of injury, i.e., impact?

As recognized by the Fourth Circuit, the "ultimate issue of MBNA's Sherman Act liability" was not before it, only the Supreme Court's decision in *Pick Mfg. Co. v. General Motors Corp.*, 299 U.S. 3 (1936), *aff'g* 80 F.2d 641 (7th Cir. 1935) was before it as reflected by the first certified question. App. at 5a. Thus, review at this time, on the narrow issues presented to the Fourth Circuit, is premature. Obviously, the outcome of the trial on damages would affect the likelihood of a final appeal of the entire case at some later date. Accordingly, review at this time is not an efficient use of the Court's and parties' resources.

ARGUMENT

I. MBNA'S PETITION IGNORES THE LIMITED SCOPE OF THE FOURTH CIRCUIT'S REVIEW

MBNA's Petition fails to focus on the procedural posture of the case before the Fourth Circuit. The jury found MBNA violated Section 1 of the Sherman Act and rejected its proffered business justification defense. MBNA then renewed its motion for directed verdict and filed a motion notwithstanding the verdict. In the order dated June 19, 1985, ("the June 19 Order") appealed to the Fourth Circuit, the District Court: (1) upheld the jury verdict as to the violation and to the fact of injury on the claim by Metrix against MBNA; (2) set aside the jury's damage award to Metrix and granted a new jury trial solely on that question; (3) granted MBNA's

JNOV motion on the counterclaim (or in the alternative, a new trial, in a subsequent order), thereby reversing the jury's finding that MBNA had not been injured as a result of Metrix' and Schwartz's § 2(c) violations; and (4) granted MBNA a new trial to prove the amount of its damages on its counterclaim.

On appeal, the first question before the Fourth Circuit was whether the trial court erred in denying the directed verdict and motion notwithstanding the verdict as to MBNA's Sherman Act liability. In this posture, the issue before the Fourth Circuit was whether there was "evidence of such quality and weight that reasonable fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party." *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980); App. at 14a. Since Metrix was the non-moving party, the Fourth Circuit was required to consider the evidence in the light most favorable to it. *See Wyatt*, 623 F.2d at 891. After analyzing the evidence under these standards, the Fourth Circuit upheld the trial court's denial of the motions as to MBNA's Sherman Act liability. MBNA's analysis of the Fourth Circuit's opinion ignores the limited role of the appellate court in this case.

II. THERE IS NO BASIS FOR THE GRANT OF CERTIORARI IN THIS CASE

Rule 17 of the Rules of the United States Supreme Court provides three grounds for jurisdiction that are potentially applicable in this case: (1) the Fourth Circuit decision conflicts with a Supreme Court decision on an important question of federal law; (2) the Fourth Circuit decision conflicts with another circuit court decision on the same matter; or (3) the Fourth Circuit decision creates another "special" or "important" reason to exercise jurisdiction. None of the foregoing circumstances is present here, and thus, a grant of certiorari is inappropriate.

A. The Fourth Circuit Decision Does Not Conflict With Any Supreme Court Decision On An Important Question Of Federal Law

The Fourth Circuit simply did not decide any important questions of federal law. It merely reviewed the evidence presented below and upheld the jury verdict as to MBNA's liability. No new or novel antitrust theory was created or necessary under the facts in this case. To the contrary, the Fourth Circuit applied established Supreme Court precedent concerning the legality of tying arrangements to facts establishing a classic tying arrangement. MBNA attempts to create an important issue of federal law by asking this Court to reverse established antitrust precedent governing the law of tying arrangements.

1. *Established Antitrust Precedent Governs The Legality Of Tying Agreements*

Under Section 1 of the Sherman Act, all contracts, combinations and conspiracies in unreasonable restraint of interstate or foreign commerce are illegal. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different [or tied] product, or at least agrees that he will not purchase that product from any other supplier," *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5-6 (1958), and can be *per se* unreasonable under Section 1 of the Sherman Act.

To establish a *per se* illegal tying arrangement under antitrust law and as applied in the District Court, a plaintiff must show:

> (1) There are two separate products with the purchase of one (the tying product) conditioned upon the purchase of the other (the tied product);
>
> (2) The seller possesses sufficient market power or leverage to "force" the buyer to accept the tie-in and appreciably restrain competition in the tied product market; and

(3) A not insubstantial amount of commerce in the tied product is affected.

See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 37-41 (1984); *White Motor Company v. United States*, 372 U.S. 253, 262 (1963).

Recognizing that tying arrangements which fall within the foregoing parameters "pose an unacceptable risk of stifling competition," this Court recently reaffirmed the *per se* prohibition. *Hyde*, 466 U.S. at 8. A *per se* prohibition is required because an unlawful tie-in directly contradicts the fundamental purpose of the Sherman Act:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway Co., 356 U.S. at 4. In *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), this Court articulated the fundamental anticompetitive nature of a tying agreement:

> Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. . . . By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the "tied" product would convince freely choosing buyers to select it over others anyway.

345 U.S. at 605. Impaired competition in the tied product market created by the tie-in can "either harm existing competitors or create barriers to entry of new competition in the market for the tied product [citation omitted] and can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie." *Hyde*, 466 U.S. at 14-15. In this case, the precise harm described in *Hyde* has occurred to Metrix. Metrix has lost significant sales and profits because MBNA has extended a legitimate monopoly over the granting of franchises to sell Mercedes-Benz automobiles to an illegitimate monopoly over the sale of automobile parts to M-B dealers.

Tying arrangements can be saved from *per se* illegality only if there is a legitimate business purpose for their existence. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 506 (1969) ("*Fortner I*"); *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 68 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). There are only a few such legitimate purposes accepted under current antitrust law, including preservation of goodwill of the seller's tying product when the seller's tying product works satisfactorily only in conjunction with another product made by the seller, or to protect a new business so as to enable it to overcome barriers to entry. *See White Motor Co. v. United States*, 372 U.S. 253 (1963); *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949) (hereinafter "*Standard Stations*"); *Advance Business Systems*, 415 F.2d 55; *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D.Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). The legitimate business purpose defense to *per se* illegality in tie-in cases is, therefore, exceedingly narrow. Only in the absence of less restrictive alternatives will a tying arrangement be justifiable to assure quality. *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936).

Thus, if the defendant could have instead specified the type and quality of the product to be used with the tying product or established a program for the approval of parts manufactured by others, the defense will fail. *Standard Stations*, 337 U.S. 293; *International Salt Co. v. United States*, 332 U.S. 392 (1947). In *Standard Stations*, this Court found that the only situation in which the protection of goodwill *might* necessitate the use of a tying clause is where "specifications for a substitute [product] would be so detailed that they could not practicably be supplied." 337 U.S. at 306.

The Court has strenuously applied the "no less restrictive alternative" requirement of the business justification defense. In *International Business Machines*, IBM leases for certain punching, sorting and tabulating machines required the use of IBM cards only in the machines. The Court found the leases to be unlawful tying agreements. IBM proffered the defense that the "purpose of and effect [of the tie-in] are only to preserve to appellant the good will of its patrons by preventing use of unsuitable cards which would interfere with the successful performance of its machines." 298 U.S. at 134. Despite the substantial evidence that the machines had "relatively minute tolerances" for card size, thickness and freedom from defects, the Court rejected the defense since there was "no contention" that competitors could not meet the specifications for the IBM cards. *Id.* at 139. In *International Salt*, the defendant's leases for its patented machines utilizing salt products required the lessees to purchase from defendant all salt consumed in the machines. Defendant urged a quality assurance defense: "[s]ince under the lease [defendant] remained under an obligation to repair and maintain the machines, it was reasonable to confine their use to its own salt because its high quality assured satisfactory functioning and low maintenance costs." 332 U.S. at 397. The Court rejected the defense on the ground that there was evi-

dence that competitors of defendant produced the quality salt required for the machine. *Id.* at 398.

The rationale for the strict limitation on the business purpose defense is the Court's recognition that in most cases the sole purpose of a tie-in is to restrict competition by controlling supply of the tying product. *Standard Stations*, 337 U.S. at 306. Market control of the tying product "affords a strong foundation for the presumption that it had been or probably will be used to limit competition in the tied product also." *Id.* This presumption gives rise to the requirement that the defendant, as part of the business justification defense, establish that there is no less restrictive alternative to the tie-in. *See White Motor Co.*, 372 U.S. at 270 n.9 (Brennan, J., concurring). The inquiry "is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in light of the extenuating interests." *Id.* at 270. "If the restraint is shown to be excessive for the manufacturer's needs, then its presence invites suspicion . . . that the real purpose of its adoption was to restrict . . . competition." *Id.* at 270 n.9. In this case, MBNA's tie-in with M-B dealers eliminates competition for more than 3000 parts, every part that might conceivably be used to repair Mercedes-Benz automobiles.

MBNA requests that this Court eliminate the strict standards of the business justification defense. According to MBNA, all the defendant need show to establish the business justification defense is a lawful purpose, not an actual justification. However, by eliminating the "no less restrictive alternative" component of the business justification defense, as advocated by MBNA, the Court would effectively eliminate the application of tying law to franchise relationships. Both a defendant's purpose for a tie-in and the effect of the means employed to achieve it must be evaluated, if the business justification defense is to have any meaning at all.

In essence, M-B argues that its broad purchase restriction must be permitted because the M-B dealers are franchisees. The implications of that theory would be startling.[4] The Petitioner urges the Court to eliminate the application of the law of tying to franchising, by merely claiming that the requirement that a franchisee must purchase every product it sells from its franchisor is to protect the franchisor's reputation, consumer expectations of the quality, its image and to prevent franchisees from falsifying warranty claims. The position urged by MBNA is simply not compelling. Indeed, it would eliminate substantial competition for sales to America's retailers by enabling franchisors to force their franchisees to purchase their inventory and supplies from their franchisors, regardless of quality, price or consumer demand. According to U.S. Department of Commerce surveys, an estimated four hundred seventeen thousand U.S. businesses presently operate under franchise agreements and those businesses will, by the end of 1988, account for $543 billion in sales. Retail sales generated through franchised businesses is expected to equal 34% of all U.S. retail sales. *See Franchising in the Economy 1986-1988*, U.S. Department of Commerce, International Trade Administration (1988).

Finally, MBNA maintains that only harm to the consumer is the focus of the determination of whether competition has been adversely affected. Metrix disagrees for the reasons set forth above. In any event, the largest and most constant source of M-B replacement parts available to consumers are the dealers. If MBNA is permitted to exclude independent parts distributors from competing

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[4] It is clear that tying principles remain fully applicable in the franchise context. *Kentucky Fried Chicken v. Diversified Packaging*, 549 F.2d 368, 376 (5th Cir. 1977); *see also Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1345 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

for that share of the parts market, consumers that use this major source of supply will be limited to prices and terms offered by MBNA. Consumers should be permitted to obtain the benefit of price competition in all markets.

2. *The* Pick *Decision*

Contrary to MBNA's argument, this Court's decision in *Pick Mfg. Co. v. General Motors Corp.*, 299 U.S. 3 (1936), *aff'g* 80 F.2d 641 (7th Cir. 1935), is not an exception to the case law set forth above, and does not conflict with the Fourth Circuit's opinion. As the Fourth Circuit ruled, *Pick* did not establish a new and special antitrust defense. App. at 11a-13a; *see* p. 5, *supra*. In *Pick*, the Seventh Circuit found permissible an automobile manufacturer's ban on dealers' selling or using repair parts not manufactured or authorized by the manufacturer, reasoning that the restraint was necessary for preserving public goodwill. *Id.* at 643. However, since the time that *Pick* was decided in 1936, there have been dramatic turns in the course of antitrust law in the area of tying. *Pick* predated *International Business Machines*, 298 U.S. 131; *Standard Stations*, 337 U.S. 293; *International Salt Co.*, 332 U.S. 392 and other key cases, and was tried as a rule of reason case. *Pick*, 299 U.S. at 4. Indeed, in *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953), this Court referred to *Pick* as a pre-goodwill doctrine case and described the evolution of tying law:

> With its decision in *International Salt Co. v. United States*, 332 U.S. 392 (1947), this Court wove the strands of past cases into the law's present pattern.

Id. at 608. Clearly, in that case, the Court recognized that the law of tying had significantly changed since the time of *Pick*, and that *Pick* had to be read within the confines of the evolving *per se* rule and the goodwill doctrine.

In fact, this Court has never adopted the Seventh Circuit's *Pick* reasoning despite its affirmance per curiam; to the contrary, it has indicated in both *Times-Picayune* and *Standard Stations* that *Pick* belonged to the "old school" of tying cases. This Court has never regarded its affirmance in *Pick* as standing for anything more than the general rule that upholds the findings of two lower courts unless clear error is shown. *See, e.g., Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214-15 (1948); *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515, 542 (1937); *Mechanics Universal Joint Co. v. Culhane*, 299 U.S. 51, 53 (1936).

Although MBNA strains to persuade this Court that *Pick* remains "a viable strand of the law of tying" today, Petitioner falls woefully short of the mark. Contrary to MBNA's arguments, the *per se* rule against tying has remained intact since it was pronounced in *International Salt*. MBNA attempts to demonstrate the continued efficacy of *Pick* through such dubious devices as citing Justice White's dissent in *Fortner I* and Justice O'Connor's subsequent citation of that reference in the concurrence in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

Petitioner's misplaced reliance on *Pick* is never more obvious than in Petitioner's citations of cases outside the Fourth Circuit which allegedly "recognize that *Pick* remains good law." Petition at 13 (citing *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965); *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 937 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970); *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790, 808 (M.D. N.C. 1957), *aff'd*, 252 F.2d 441 (4th Cir. 1958); *IAP, Inc. v. Mercedes-Benz of North America, Inc.*, 571 F. Supp. 262 (D.N.J. 1983)). None of the foregoing cases rely on *Pick* for the proposition that MBNA seeks to advance—an automotive industry or franchise exception to the antitrust laws. All four

cases cite *Pick* only in dicta. MBNA maintains that *Susser* cites *Pick* for the proposition that an ice cream store franchisor "could require franchisees to refrain from selling products of other manufacturers because this was reasonably necessary for the protection of . . . goodwill." *Susser*, 332 F.2d at 517. However, the *Susser* Court also stated that "the only situation, indeed in which the protection of goodwill may necessitate the use of tying clauses is where specifications for a substitute [for the tied product] would be so detailed that they could not be practicable." *Id.* at 512 (quoting *Standard Oil Co. of Calif. v. U.S.*, 337 U.S. 293, 306 (1949)). Here, however, specifications were available and provided by DBAG to OEMs on a regular basis. *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, is not even a tie-in case. In *Miller Motors*, "there was no express condition, agreement or understanding that plaintiff would not use or deal in the goods of a competitor or competitors of Ford," and that the plaintiff "did so deal, to a substantial extent." Finally, *IAP, Inc.* has no precedential value, since the plaintiffs did not oppose MBNA's Motion for Summary Judgment, asking instead that the case be dismissed. The plaintiff sought dismissal in *IAP, Inc.* because MBNA, in connection with another tie-in case, *Technical Leasing Collective, Inc. v. Daimler-Benz Aktiengesellschaft*, No. N-79-1443 (D. Md. April 9, 1981) issued letters to franchisees agreeing not to enforce the tying clause.

Similarly, MBNA's reliance on *Pick* as a reflection of "contemporary antitrust jurisprudence" is without foundation. The Department of Justice guidelines, which MBNA relies upon as a reflection of "contemporary antitrust jurisprudence," have no precedential value. Moreover, the United States Congress passed a joint resolution providing that the 1985 Vertical Restraint Guidelines:

(1) are not an accurate expression of the Federal antitrust laws or of congressional intent with regard to the application of such laws to resale price maintenance and other vertical restraints of trade;

(2) shall not be accorded any force of law or be treated by the courts of the United States as binding or persuasive; and

(3) should be recalled by the Attorney General.

Act of Dec. 13, 1985, Pub. L. No. 180, Sect. 605, 1985 U.S. Code Cong. & Ad. News (99 Stat.) 1170. As recognized by the Congress "such policy guidelines are inconsistent with established antitrust law, as reflected in Supreme Court decisions. . . ." *Id.* at 1169.

In essence, MBNA is asking this Court to upset clear precedent and forge new law by rejecting the *per se* rule against tie-ins. By emphasizing the "procompetitive effect" of the tie-in, MBNA advocates applying a rule of reason standard to tying arrangements. In *Jefferson Parish*, the Supreme Court confirmed that "*per se* condemnation" of tie-ins is appropriate "when the seller's share of the market is high, . . . or when the seller offers a unique product the competitors are not able to offer, and the court has held that the likelihood that market power exists and is being used to restrain competition in separate market[s] . . . ." *Id.* at 12 (citations omitted). Thus, the notion of a special *Pick* exception to the current law of tying is sheer sophistry.

3. *This Case Is Factually Distinguishable From* Pick

A further reason the Fourth Circuit's decision does not conflict with *Pick* is that this case is factually distinguishable. *Pick* was decided at a time of a fledgling automotive industry in 1936. In the ensuing fifty years, courts have examined a myriad of tying and other anticompetitive practices, creating an extensive body of case law. In establishing its claim, Metrix in 1985, unlike the plaintiff

in *Pick* in 1936, had the burden—under antitrust tying law as it had developed in the intervening years—of proving facts which established market power in the tying product on the *per se* claim and a relevant submarket on its rule of reason claim. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984). As a consequence, Metrix was required to develop the relevant facts much more substantially than was the plaintiff in *Pick*. *Pick* is therefore inapposite to, and distinguishable from, the facts facing the Court in light of the substantially less-developed factual predicate required at the time of *Pick*.

As detailed above in the Statement of the Case, many of the parts sold by Metrix and other warehouse distributors were identical to and/or met the specifications of equivalent parts distributed by MBNA. C.A. App. 870-73, 876-77, 1454-56. In *Pick* by contrast, the plaintiff never contended that its parts were either the same as or met the specifications of GM parts.

B. There Is No Conflict Within The Circuits

Contrary to MBNA's assertion, there is no confusion in the federal appellate courts concerning *Pick*. MBNA's argument that *Pick* establishes a separate and unique antitrust exception has been consistently rejected. As acknowledged by MBNA, the district court in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 593 F.Supp. 1506, 1512 (N.D. Cal. 1984), explicitly rejected MBNA's argument that *Pick* created an antitrust exception or defense. Petition at 15. The Ninth Circuit affirmed the district court in *Mozart* without addressing *Pick* other than to state that M-B "never seriously relied upon, *Pick*. More importantly, it did not win on that basis." 833 F.2d 1342, 1348 (9th Cir. 1987). M-B prevailed in *Mozart* because the jury found that it had established the tradi-

tional business justification defense. *Id.* at 1344. The fact that the jury in *Mozart* found a business justification for the tying arrangement and the jury rejected the defense in this case did not create a conflict in the circuits. The facts were different in each case. Even if the facts were identical in both cases, the fact that two juries came to different conclusions does not create a conflict in the circuits as long as both courts apply the same law and there is sufficient evidence to support either verdict.

MBNA's reliance on the alleged confusion of the district courts as the basis for the certiorari is inconsistent with Rule 17. Only a conflict among the circuit courts is a legitimate basis for the exercise of this Court's review. Circuit courts are the appropriate body to resolve conflicts among district courts. In this case for example, the Fourth Circuit's decision will provide the guidance necessary to the trial court in this Circuit.

C. There Is No "Special" Or "Important" Reason To Grant Certiorari

Recognizing that no case law supports the abolition of the less restrictive alternative requirement, MBNA requests this Court to grant certiorari on the ground that the less restrictive requirement conflicts with "modern antitrust jurisprudence." Within the term "modern antitrust jurisprudence," MBNA includes quotations from a Department of Justice *amicus curiae* brief, adulterated quotations from the concurring opinion in *Hyde*, and citations to various books and law review articles. The foregoing sources both conflict with established Supreme Court authority set forth above, and lack precedential value. The alleged conflict between established precedent and "modern antitrust jurisprudence" does not constitute a "special" or "important" reason as required by Rule 17 to grant certiorari.

Furthermore, MBNA attempts to mislead this Court when it states the "Fourth Circuit reject[ed] MBNA's proffered business justification . . . ." The jury, not the

Fourth Circuit, rejected MBNA's business justification defense. The Fourth Circuit merely upheld the jury's decision, finding sufficient evidence in the record to support it. MBNA simply refuses to accept the role of the appellate court in this case.

Contrary to MBNA's assertion, the Fourth Circuit's analysis of the less restrictive alternatives was not "a sterile exercise in labelling" but a practical assessment of alternatives to the tying agreement.[5] With regard to MBNA's argument that the tie-in was justified by its need to insure that consumers obtain "genuine" M-B parts, the less restrictive alternative discussed in the Fourth Circuit's opinion was simply to inform consumers of the origin of parts sold. App. at 15a. As noted by the Fourth Circuit, "[i]n this manner, a customer who expected MBNA parts could have purchased them." *Id.* This alternative directly addresses MBNA's perceived justification and certainly is feasible. Contrary to MBNA's argument, this alternative would not result in preventing "consumers from affecting their market choices." Dealers will stock the parts that sell, and if MBNA parts have intrinsic superiority, presumably consumers will insist on them. A further problem with MBNA's argument, however, is that it ignores the fact that most of Metrix' parts are identical to "genuine" parts and therefore enforcement of the tie-in serves no legitimate purpose. MBNA's "free rider" concern ignores the fact that there was no evidence that Metrix parts were inferior. It is MBNA that is raising hypothetical concerns and palming them off as legitimate justifications for its unlawful tie-in.

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[5] MBNA maintains that the Fourth Circuit erred in rejecting "MBNA's proffered business justification without *any* economic analysis of the procompetitive purpose served by the challenged restraint." Petition at 16. The Court, however, in *Standard Stations* explicitly rejected an evaluation of the procompetitive effects of tie-in agreements as advocated by MBNA. 337 U.S. at 307-311. MBNA seeks to modify the defense to make it impossible for a court to deny it.

With regard to MBNA's claim that the tie-in was justified by its need to prevent fraudulent warranty claims, the Fourth Circuit recognized that "stamping" or "marking" the parts could prevent the alleged problem. The practicality of "stamping" the parts cannot be disputed, since MBNA has always done so. MBNA's argument that this alternative will be too costly and time-consuming is without any support in the record. If the alternative is impractical, MBNA should have come forth with evidence at trial and persuaded the jury. A petition for certiorari is not the appropriate vehicle to raise new factual arguments.

The primary reason the Fourth Circuit upheld the jury verdict was that the evidence did not support MBNA's assertions that fraudulent warranty claims were a problem. The Fourth Circuit found that MBNA "failed to show that its 'genuine' parts could not be distinguished from those of its competitors and that it could not avoid reimbursing dealers for competitors' defective parts." App. at 16a. MBNA was probably unable to present evidence that the tie-in was necessary to police dealer warranty claims because it was not a problem. Other than anecdotal testimony from one witness that fraudulent claims had been submitted one or two times, MBNA introduced no evidence of fraudulent claims. Accordingly, there is no merit to MBNA's claim that the "stamping" system "has not prevented warranty fraud." Petition at 27.

With regard to MBNA's final justification for the tie-in—the need to ensure that customers received quality parts—the Fourth Circuit recognized that MBNA could designate preferred manufacturers and provide them with design specifications. App. at 14a. This Court has recognized repeatedly that design specifications are a legitimate practical alternative to a tie-in. *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949); *International Salt Co. v. United States*, 332 U.S. 392 (1947). There can be no dispute as to the feasibility of

issuing specifications in this case. DBAG already issued product design specifications to West German companies that manufactured more than half of the replacement parts that MBNA sold to dealers. MBNA's argument that this alternative ignores MBNA's quality control program assumes the same quality control program could not be imposed on the "preferred manufacturers."

In any event, the less restrictive alternative analysis is not essential to uphold the jury verdict. The facts in the record simply do not support MBNA's claim that quality testing is essential to consumer welfare. Despite the practice of stamping MBNA parts numbers on "genuine" replacement parts, and the resulting ability to identify those parts distributed through MBNA's quality control network, no proof was offered that performance-failure rates vary according to source of distribution. In fact, no evidence of consumer preference for MBNA parts was presented; the only evidence offered was anecdotal testimony to the effect that consumers expected MBNA parts. Moreover, it is clear that MBNA's real concern was not quality; its real concern was profit. C.A. App. 664-65.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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